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10/772,948

02/05/2004

Wayne Gerald Morley

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EXAMINER

CHAWLA, JYOTI

ART UNIT

PAPER NUMBER

1794

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/772,948	Applicant(s) MORLEY, WAYNE GERALD	
	Examiner JYOTI CHAWLA	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 7,9,10,15 and 16 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 7,9,10,15 and 16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's response filed on December 5, 2007 is acknowledged. Claims 1-6,8, and 11-14 have been cancelled. Two new claims 15-16 have been added and claims 7,9 and 10 have been amended. Claims 7, 9-10 and 15-16 are pending and examined in the application.

Claim Objections

Objection to claims 1-11 and 13 has been withdrawn based on applicant's amendment filed December 5, 2007.

Claim Rejections - 35 USC § 112 (First Paragraph)

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 15, 16, 7, 9 and 10 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Claim 15 as recited states "A kit for preparing salads *comprising* at least one ingredient which is cooked and at least one fruit, vegetable or cereal product, wherein the kit *comprises*:

(a) a flavored cooking paste for cooking said ingredient, which cooking paste comprises about 45 to about 75% wt fat and about 0 to about 2% wt water, based on the weight thereof, and

(b) a salad dressing for contacting with the at least one fruit, vegetable or cereal product, which salad dressing is an oil-in-water emulsion and comprises about 15 to about 35% wt fat based on the weight thereof, wherein the total fat content of said cooking paste and said dressing combined is about 15 to about 50% based on the combined weight of said paste and said dressing; wherein the weight ratio of the amount of the cooking paste to the amount of the dressing is about 1:5 to about 2:1."

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The claim as recited is not enabled because one of skill in the art will not be able to make and use the invention as recited. For example, if the cooking paste and dressing are added in the relative proportions (1:5 to 2:1) as recited in line 12 of the claim, the total fat content of the paste and dressing combined would not fall in the range as recited. To illustrate a few scenarios have been worked to show the total fat content of the combination

	Paste	Dressing
Fat content	45%	15%
Proportion (a)	1	5
Total fat content of combination	$[45+5(15)]/6=$ 20%	
Fat content	45%	15%
Proportion (b)	2	1
Total fat content of combination	$[2(45) + 15]/3=$ 35%	
Fat content	75%	35%
Proportion (a)	1	5
Total fat content of combination	$[75+5(35)]/6=$ 42%	
Fat content	75%	35%
Proportion (b)	2	1
Total fat content of combination	$[2(75) + (35)]/3=$ 62%	

Thus as demonstrated that the minimal fat level is 20% and the maximum is 62% which is clearly more than the instantly claimed combined fat content in line 10 of claim 15.

Thus one of skill in the art would not necessarily be able to make the invention within the fat content specified by using the proportions of individual components as recited in the claim. The specification also discloses the same proportions as recited in the claim. Thus the specification and the claim as recited do not enable one of skill to make and use the invention as recited in the newly added independent claim 15.

Claim Rejections - 35 USC § 112 (Second Paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Rejection of claims 1-6, 8 and 11-13 made under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention have been withdrawn in light of applicant's amendment dated December 5, 2007 cancelling the above claims.

Claims 7, 9-10 15 and 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 15 as recited is indefinite for the recitation of "A kit for preparing salads comprising at least one ingredient which is cooked and at least one fruit, vegetable or cereal product, wherein the kit comprises".

Applicant's remark regarding the new claim 15, as being absolutely clear in its meaning (Remarks, page 5) has been considered but it has not been found convincing because claim 15 has the same limitations as the previously presented claim 1 (now cancelled). Claim 15, recites "A kit for preparing salads *comprising* at least one ingredient which is cooked and at least one fruit, vegetable or cereal product, wherein the kit *comprises* (a)...(b)...thereof". Thus the claim as recited is unclear as to what is included in the kit, i.e., does the kit comprise of a cooked ingredient and one fruit/vegetable/cereal product along with the flavored cooking paste and a dressing along with other things as the claim uses the open ended term *comprises*. Thus it is still unclear as to what is included in the kit as recited and what the kit can be used for. Correction is required.

Claim 15 is also indefinite because the individual fat content of the cooking paste and dressing as recited (lines 4 and 7 of claim 15) when added in the relative proportion as recited (line 12) of the claim do not fall in the range recited as the total fat content of the two components as recited in line 10 of claim 15. It is also unclear as to how the

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proportion of total fat is being determined, is it the combination of the sauce and the dressing in its entirety or is it part of the sauce being combined with part of the dressing or some other combination of the sauce and dressing or is it the proportion of the total fat content of the food prepared using the kit. Correction is required.

Note: See the details in the 112 First paragraph rejection above.

Claim 16 provides for the use of the kit, however, the claim as recited is indefinite because of the recitation of "said ingredient is cooked in the flavored cooking paste". As recited, claim 16 depends from claim 15, where the kit includes a cooked ingredient and a flavored cooking paste as separate components of the kit. Claim 16 recites that the ingredient is cooked in the paste, thus as recited it is unclear whether the said ingredient is cooked or uncooked prior to its addition to the flavored paste. Alternatively if the ingredient is cooked in the flavored paste to start with, then it is unclear whether the flavored paste present as part of the kit is in addition to the paste present with the cooked ingredient or does the paste along with the cooked ingredient form a combined part of the kit as recited in claim 15.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

A) Claims 7, 9-10 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tomlinson (US 2001/0043972) in view of the combination of Errass et al (US 4497803), Bams et al (US 4650690).

Regarding claims 15 and 16, Tomlinson teaches of an individual portion sized food container system for packaged food portions, such as salads, vegetables, fruits, cereals and meats. The reference teaches of foods that desirably need the addition of various types of salad dressings, sauces gravies, condiments and other liquids (Page 1, paragraphs [0003 to 0009]). Thus the reference teaches of an individual sized kit or system for salad as instantly claimed.

Tomlinson teaches of cheese, pasta sauce, ketchup, barbeque sauce, gravies, etc., (Page 1, paragraph [0009]), thus the reference teaches of the flavored cooking sauce or paste as instantly claimed. Tomlinson also teaches of salad dressing, mayonnaise, yogurt, cream etc., (Page 1, paragraph [0009 and 0053-0055]) as instantly claimed.

The reference is silent as to the fat content of the sauce and the salad dressing as instantly recited, however, sauces, mayonnaise and salad dressings are generally emulsions. Further, sauces and pastes and salad dressings with variable fat content, such as, low-fat, no-fat or fat-free etc., were known in the art at the time of the invention. Therefore, it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to add a sauce and/or dressing with the salad based on the desired, flavor, recipe, thickness, fat content, nutritional value or calorie content of the salad. One of ordinary skill would have been motivated to do choose the sauce and dressing comprising the level of fat in order to make the packaged kit more appealing to the intended clientele. Further, addition of salad dressing and sauce or paste having a certain amount of fat ratio would not lend patentable distinction to the claims, absent any clear and convincing evidence and or arguments to the contrary.

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Regarding step (b) of claim 15, Tomlinson teaches of salad dressing. Tomlinson is silent about the emulsion being oil-in water with fat content in the range of 15-35% by weight as instantly claimed. However, oil-in-water emulsion salad dressings were known at the time of the invention and salad dressings and sauces are oil-in water emulsions as evidenced by Errass. Errass teaches of oil-in water emulsions (Abstract and Column 1, lines 5-10 and Column 2, lines 40-50 and claims) as instantly claimed. Errass teaches of dressings that are oil-in-water emulsions and also have the fat content ranging from 10-50% (Table, Column 2) which includes applicant's recited range of 15 to 35%. Thus sauces and dressings as oil-in-water emulsions with fat content on the range recited by the applicant were known at the time of the invention. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Tomlinson to include a salad dressing with fat content in the range as taught by Errass in order to make the salad having a dressing that has the desired calorific and satiety value and the dressing imparts desired level of smoothness and/ or creaminess to the final product.

Regarding step (a) of claim 15, Tomlinson teaches of cheese, sauces, condiments or other liquids added to lettuce vegetables, fruits, cereals and/or meats. Thus the reference includes liquids and cheese to be added to the salad/ meal package or kit. Tomlinson is silent as to the fat content and the water content of the flavored sauce, however, butter and oils with anhydrous flavoring compounds fall in the fat and moisture range recited by the applicant. Further, Bams et al, hereinafter Bams, teaches of water-in-oil-in-water emulsions that make cooking sauces etc. Bams teaches of sauces with 10-80% of oil which includes the instantly claimed range of 45 to 75%. Bams teaches that sauces with the fat content in the instantly claimed range were known at the time of the invention. Also low moisture flavored fats, such as garlic butter, olive oil with dried spices etc., have also been known to flavor foods. To select a sauce based on the fat/ calorie content and based on the flavor/taste would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention. Also to choose a sauce based on the amount of water content would also be within the purview

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of one of ordinary skill in the art based on the microbiological safety and shelf life of the flavored sauce desired. Therefore, one of ordinary skill would have been motivated to modify Tomlinson's packaged food kit and include a sauce with fat content in the range of as taught by Bams and low moisture content as desired in order to make the salad/meal kit with sauce or paste that lends more satiety value in the meal. One would have been further motivated to modify Tomlinson and include a sauce or paste with low moisture content in order to have a long shelf life of the packaged sauce or paste in the kit. Further, inclusion of a salad dressing and sauce or paste having a certain amount of fat ratio and low moisture content would not lend patentable distinction to the claims, absent any clear and convincing evidence and or arguments to the contrary.

Further Regarding claim 15, Tomlinson is silent about the weight ratio of the cooking paste to dressing is in the range of from 1:5 to 2:1 as instantly claimed. However, addition of cooking sauce and dressing in variable amount was known in the art at the time of the invention based on the desired flavor and consistency in the finished product. Thus to include sauce and dressing in a kit in an optimal amount would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention, e.g., to include more of sauce and less dressing if the salad has more meat or vegetables that are cooked with the sauce or to include a greater amount of dressing if the salad kit includes more of the salad leaves and raw vegetables, would have been a matter of personal choice. Therefore it would be obvious to one of ordinary skill to modify the kit as taught by Tomlinson in order to accommodate the desire of the consumer. One would have been further motivated to modify the relative amounts of sauce and dressing in order to customize the kits according to the relative amounts of cooked vs. non-cooked foods in the kit. Also it is a matter of personal preference to add sauces and dressing in a certain amount. Thus inclusion of salad dressing and sauce or paste in a specific proportion in the packaged food does not lend patentable distinction to the claims, absent any clear and convincing evidence and or arguments to the contrary.

Note: please also refer to the rejection of claims under 112 First and Second paragraph.

Regarding claim 7 Tomlinson as modified by Errass and Bams would have the fat ratio of the dressing and the sauce in the instantly claimed range of the applicant.

Regarding claim 9, Tomlinson teaches of at least one cooked ingredient as meat, cooked vegetables (Page 1, Paragraphs [0003 and 0008-0009]) as instantly claimed.

Regarding claim 10, Tomlinson teaches of salad leaves (Page 1, Paragraphs [0003 and 0008-0009]) as instantly claimed.

Regarding claim 16, Tomlinson teaches of a packaged individual portions of food (a kit) for making salad containing lettuce, vegetables, cereals and /or meats (cooked ingredient) with salad dressing and sauce and cheese (Paragraphs [0002] to [0014]). The cooked ingredient (i.e., cereal or meat or vegetable) can have added sauce or cheese etc. Tomlinson also teaches of pouring the salad dressing over the fruit vegetable or cereal product (Page 2, paragraph [0013]), thus the fruit vegetable or cereal product comes in contact with the dressing as instantly claimed.

B) Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over OVOFIT EIPRODUKTE GMBH (DE 20008456 U1 Abstract and figures).

Ovofit teaches of a convenient salad kit where the bowl of salad (claim 10) is sold with a cooked egg (packaged separately from the salad) (claim 9) and a number of other blister packs containing other accompaniments as shown in figure 2. The reference also teaches of salad dressing package 15 (Figure 2 and description of figure 2 on pages 3-4 of the patent). Egg yolk being a part of egg is also part of the packaged food. Egg yolk is a high fat low moisture paste which adds flavor to the packaged food. The abstract of the reference does not provide details of the fat content of the salad dressing or sauce etc., however sauces and salad dressings with variable fat contents were known in the art at the time of the invention. Therefore it would have been a matter of routine

determination for one of ordinary skill in the art at the time of the invention to add a sauce and/or dressing with the salad based on the desired, fat content, nutritional value or calorie content of the salad. One of ordinary skill would have been motivated to do so in order to enhance the appeal of the packaged salad or food article to the intended clientele.

C) Claims 15, 16 and 9, 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over GREISINGER N (DE 20104287 U1 Abstract and figures). Greisinger teaches of a convenient meal or salad kit where the container of salad (Figures 1-3)(claim 10) is sold with meat, sausage etc., (claim 9) and a number of other blister packs containing other accompaniments as shown in figure 2. The reference also teaches of mayonnaise (high fat , low moisture sauce or paste) in a suitable mixing ratio to make the recipe (Abstract). The abstract of the reference does not provide details of the fat content of the salad dressing or sauce etc., however mayonnaise is an emulsion and mayonnaise and sauces with variable fat contents were known in the art at the time of the invention. Therefore it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to add a sauce and/or dressing with the salad based on the desired, fat content, nutritional value or calorie content of the salad. Further the mayonnaise in the meal kit as taught by Greisinger is intended to be applied to other ingredients in the kit as recited in claim 16. Therefore, one of ordinary skill in the art at the time of the invention would have been motivated to pack all the sauces or dressings and condiments separately in order to enhance the appeal of the packaged salad or food article to the intended clientele.

Response to Arguments

Applicant's arguments filed December 5, 2007 have been fully considered but they are not persuasive.

I) Applicant's request to acknowledge a reference in the IDS of 1/10/2005 has been considered however, as the document ID number is incorrectly listed in the said IDS the reference can not be acknowledged as requested. Applicant is required to

submit an IDS with only the Tomlinson reference with the correct identifier in order to be considered. The other previously submitted and acknowledged references should not be included in the new IDS to avoid duplication.

II) Applicant's remarks stating that the invention as instantly claimed "is absolutely clear" (page 5) have been considered but have not been found persuasive as discussed above under 35 U.S.C. 112 rejections.

III) In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Tomlinson, Erras, and Bams have been relied on in an obviousness rejection to show that packaged meals and /or salads with cooked ingredients and fruits, vegetables or cereal material combined or combinable with sauces and dressings etc., were known at the time of the invention and to substitute one kind of packaged sauce or dressing for another would have been a matter of desire of the consumer and also a matter of routine determination for one of ordinary skill in the art at the time of the invention as discussed in the office action above. Thus the claims as recited are obvious over the combination of references, absent any clear and convincing arguments and or evidence to the contrary.

Furthermore, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Thus applicant's arguments filed December 5, 2007 have been fully considered but have not been found persuasive and the claims 7, 9, 10, 15 and 16 are rejected for the reasons of record.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Supervisory Patent Examiner, Art Unit 1761

/Jyoti Chawla/
Examiner
Art Unit 1794